Dato' Seri Anwar bin Ibrahim v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–229–10 OF 2013(W)
RAUS SHARIF PCA, ABDULL HAMID EMBONG, AHMAD MAAROP, HASAN LAH AND ABU SAMAH FCJJ
21 NOVEMBER 2013

Criminal Procedure — Appeal — Appeal against decision of Court of Appeal — Appointment of advocate as Deputy Public Prosecutor — Whether appointment of advocate nullity and of no effect — Whether contrary to s 378 of the Criminal Procedure Code — Advocate potential witness in High Court — Whether there would be conflict of interest — Whether there would be breach of Legal Profession (Practice & Etiquette) Rules 1978

In the present appeal, the appellant appealed against the decision of the Court of Appeal in dismissing his application to disqualify Tan Sri Dr Muhammad Shafee bin Abdullah ('Tan Sri Shafee') to act as a deputy public prosecutor ('DPP') before the Court of Appeal in *Rayuan Jenayah* No No W-05–19–01 of 2012. The appellant was acquitted and discharged by the High Court for an offence under s 377C of the Penal Code but the public prosecutor had lodged an appeal at the Court of Appeal against the said acquittal and discharge. For the purpose of the appeal, Tan Sri Shafee, an advocate was appointed as a DPP. The appellant raised two issues against the decision of the Court of Appeal namely, that the appointment of Tan Sri Shafee as the DPP was a nullity and of no effect as it was contrary to s 378 of the Criminal Procedure Code ('CPC'); and that Tan Sri Shafee was a potential witness before the High Court and would hence place himself in the position of conflict and would therefore be in breach of r 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978.

Held, dismissing the appeal:

(1) Section 378 of the CPC must not be read in isolation. It must be read together with ss 376(3) and 379 of the same act. These two latter provisions are complementary. The two provisions clearly give the public prosecutor the authority to employ an advocate and in this case, Tan Sri Shafee, to conduct the appeal. Hence, there was no merit on this issue (see para 7).

(2) It was an undisputed fact that at the trial before the High Court, both the prosecution as well as the defence did not find Tan Sri Shafee to be a relevant witness. He was not called as a witness. Thus, the issue that he might be a potential witness at the trial that could give rise to a conflict of interest was a non-issue. Whether a case of conflict of interest in a given

case would be made out would depend on the facts and circumstances of each case. On the facts and circumstances of this case, no case had been made out to prevent Tan Sri Shafee from acting as a DPP in the appeal on the ground of conflict of interest. There was no reason to nullify the appointment of Tan Sri Shafee as the DPP to represent the public prosecutor in this proceeding (see para 9).

[Bahasa Malaysia summary

Dalam rayuan ini, perayu merayu terhadap keputusan Mahkamah Rayuan kerana menolak permohonannya untuk menyingkir Tan Sri Dr Muhammad Shafee bin Abdullah ('Tan Sri Shafee') untuk bertindak sebagai timbalan pendakwa raya ('TPR') di hadapan Mahkamah Rayuan dalam Rayuan Jenayah No W-05–19–01 Tahun 2012. Perayu adalah dibebaskan dan dilepaskan oleh Mahkamah Tinggi untuk kesalahan di bawah s 377C Kanun Keseksaan tetapi pendakwa raya telah membuat rayuan di Mahkamah Rayuan terhadap pembebasan dan pelepasan tersebut. Untuk tujuan rayuan ini, Tan Sri Shafee, peguambela dilantik sebagai TPR. Perayu membangkitkan dua isu terhadap keputusan Mahkamah Rayuan iaitu, bahawa pelantikan Tan Sri Shafee sebagai TPR adalah batal dan tidak berkuat kuasa memandangkan ia adalah bertentangan s 378 Kanun Tatacara Jenayah ('KTJ'); dan bahawa Tan Sri Shafee saksi berpotensi di hadapan Mahkamah Tinggi dan akan meletakkan dirinya dalam kedudukan konflik dan akan dengan itu memungkiri k 5(a) Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Kesopanan) 1978.

Diputuskan, menolak rayuan:

(1) Seksyen 378 KTJ tidak boleh dibaca secara sendiri/terasing. Ia mesti dibaca bersama dengan ss 376(3) dan 379 Kanun yang sama. Kedua-dua peruntukan ini adalah saling melengkapi. Kedua-dua peruntukan ini jelas memberikan pendakwa raya kuasa untuk mendapatkan khidmat peguambela dan dalam kes ini, Tan Sri Shafee, untuk menjalankan rayuan. Maka, tiada merit ke atas isu ini (lihat perenggan 7).

(2) Adalah fakta yang tidak dipertikaikan bahawa di perbicaraan di hadapan Mahkamah Tinggi, kedua-dua pihak pendakwaan dan juga pembelaan tidak mendapati yang Tan Sri Shafee sebagai saksi relevan. Dia tidak dipanggil sebagai saksi. Maka, isu yang dia mungkin adalah saksi berpotensi di perbicaraan yang mungkin membangkitkan konflik kepentingan adalah bukan isu. Sama ada suatu kes konflik kepentingan dalam kes ini akan berbangkit akan bergantung atas fakta dan keadaan setiap kes. Atas fakta dan keadaan kes ini, tiada kes yang dibuat untuk menghalang Tan Sri Shafee daripada bertindak sebagai TPR dalam rayuan atas alasan konflik kepentingan. Tiada sebab untuk membatalkan pelantikan Tan Sri Shafee sebagai TPR untuk mewakili pendakwa raya dalam prosiding ini (lihat perenggan 9).]

Legislation referred to

Criminal Procedure Code ss 112, 376(3), 378, 379
Legal Profession (Practice and Etiquette) Rules 1978 r 5(a)
Penal Code s 377C

Appeal from: Criminal Appeal No W-05–19–01 of 2012 (Court of Appeal, Putrajaya)

Karpal Singh (Sangeet Kaur Deo with him) (Karpal Singh & Co) for the appellant.
Muhammad Shafee Md Abdullah (Mohamad Hanafiah Zakaria and Nooring Badaruddin with him) (Attorney General's Chambers) for the respondent.

Raus Sharif PCA (delivering judgment of the court):

[1] This is an appeal by Dato' Seri Anwar bin Ibrahim ('DSAI') against the decision of the Court of Appeal in dismissing his application to disqualify Tan Sri Dr Muhammad Shafee bin Abdullah ('Tan Sri Shafee') to act as a deputy public prosecutor before the Court of Appeal in *Rayuan Jenayah* No W-05–19–01–2012.

[2] In this case, DSAI was acquitted and discharged by the Kuala Lumpur High Court for an offence under s 377C of the Penal Code. The public prosecutor had lodged an appeal at the Court of Appeal against the said acquittal and discharge. For the purpose of the appeal, Tan Sri Shafee, an advocate was appointed as a deputy public prosecutor by the public prosecutor.

[3] Before us, Encik Karpal Singh, learned counsel for DSAI, raised two issues against the decision of the Court of Appeal. Firstly, the Court of Appeal was wrong in concluding that the appointment of Tan Sri Shafee was valid. Secondly, the Court of Appeal was wrong in not concluding that Tan Sri Shafee was a potential witness before the High Court and would place himself in position of conflict and would therefore be in breach of r 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978.

[4] The main contention of Encik Karpal Singh on the first issue was that the appointment of Tan Sri Shafee as the deputy public prosecutor was a nullity and no effect as it is contrary to s 378 of the CPC which states:

> 378 No one to appear for Public Prosecutor
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> No person shall appear on behalf of the Public Prosecutor on any criminal appeal other than the Public Prosecutor, a Senior Deputy Public Prosecutor or a Deputy Public Prosecutor.

[5] It was argued by Encik Karpal Singh that s 378 of the CPC clearly

prohibits any other person not being a deputy public prosecutor from appearing on behalf of the public prosecutor in criminal appeals proceedings. In support, Encik Karpal Singh referred to us the repealed provision of s 378 of the CPC and pointed out that the phrase 'or an advocate expressly authorised in writing by the public prosecutor or by a deputy public prosecutor acting on behalf of the Public Prosecutor' was purposely deleted by Parliament from the current provision of s 378 with the intention of preventing an advocate from appearing on behalf of the public prosecutor.

[6] The above argument was rejected by the Court of Appeal. The Court of Appeal was of the view that s 378 of the CPC must be interpreted in light of other provisions and in particular ss 376(3) and 379 of the CPC. For ease of reference we reproduce the two sections:

> 376 Public Prosecutor
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> (3) The Public Prosecutor may appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor or under this Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally and he may designate any of such Deputy Public Prosecutors as Senior Public Prosecutors.
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> 379. Employment of advocate
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> With the permission in writing of the Public Prosecutor an advocate may be employed on behalf of the Government to conduct any criminal prosecution or inquiry, or to appear on any criminal appeal or point of law reserved on behalf of the Public Prosecutor. The advocate shall be paid out of the public funds such remuneration as may be sanctioned by the Minister of Finance and while conducting such prosecution or inquiry, or appearing on such criminal appeal or point of law reserved, shall be deemed to be a 'public servant'.

[7] We are in agreement with the approach taken by the Court of Appeal in rejecting Encik Karpal Singh's reading of s 378 of the CPC. We are of the same view with the Court of Appeal that s 378 must not be read in isolation. It must be read together with ss 376(3) and 379. These two latter provisions are in our view complementary. And the two provisions clearly give the public prosecutor the authority to employ an advocate and in this case, Tan Sri Shafee, to conduct the appeal in *Rayuan Jenayah* No W-05–19–01–2012. Hence, we see no merit on the first issue raised by Encik Karpal Singh.

[8] On the second issue, it was submitted by Encik Karpal Singh that the Court of Appeal was wrong in not concluding that Tan Sri Shafee was a material witness in the trial of DSAI before the High Court and having regard to the conflict of interest was, therefore disqualified from being appointed as a

deputy public prosecutor in DSAI's appeal in the Court of Appeal. Encik Karpal Singh submitted that the Court of Appeal was wrong to conclude at para 35 of the judgment which reads:

> We agree with the submission of learned DPP that the position of Datuk Seri Shafee to prosecute this appeal is no difference from the role of Encik Karpal Singh as a defence counsel in *Public Prosecutor v Dato' Seri Anwar Ibrahim & Anor* [2001] 3 MLJ 193. In relation to that case, Encik Karpal Singh disclosed in Dewan Rakyat on 22 October 1997 that the complainant and one of the witnesses in that case had met him regarding the applicant over the case. His statement was also recorded by the police. That would have made him a potential witness. He however represented the applicant as counsel throughout that trial. By comparison in our view, Encik Karpal Singh's role then is not too dissimilar than the facts referred to in respect of this issue. We say this because despite him being a potential witness Encik Karpal Singh acted as the counsel for the applicant during the trial. Whereas in the pending appeal the proceeding would proceed without witnesses.

[9] It was argued by Encik Karpal Singh that the above conclusion by the Court of Appeal was a clear misdirection. According to him, in that case no objection was taken by the public prosecutor, who conducted the prosecution, unlike in the present case where an objection has been taken specifically through a notice of motion. With respect, we are unable to agree with the submission put forward by Encik Karpal Singh. Firstly, it is an undisputed fact that at the trial before the High Court both the prosecution as well as the defence did not find Tan Sri Shafee to be a relevant witness. He was not called as a witness. Thus, the issue that he may be a potential witness at the trial that could give rise to a conflict of interest is a non-issue. Secondly, whether a case of conflict of interest in a given case is made out would depend on the facts and circumstances of each case. On the facts and circumstances of this case, we are of the view that no case had been made out to prevent Tan Sri Shafee from acting as a deputy public prosecutor in the appeal on the ground of conflict of interest. We see no reason to nullify the appointment of Tan Sri Shafee as the deputy public prosecutor to represent the public prosecutor in this proceeding.

[10] Before concluding, we would like to place on record that Encik Karpal Singh by way of a letter dated 12 November 2013 had raised another issue ie the effect of striking out of two affidavits deposed by Tan Sri Shafee in encl 31 and Puan Noorin bt Badaruddin in encl 32 in reply to the affidavit of DSAI. We also would place on record that we have a written response by Tan Sri Shafee by way of a letter dated 19 November 2013 on the issue raised by Encik Karpal Singh.

[11] It was pointed out by Encik Karpal Singh that with the striking out of the affidavit of Tan Sri Shafee affirmed on 11 September 2013, the letter of appointment of Tan Sri Shafee as a deputy public prosecutor as exhibited in the

affidavit was not before the Court of Appeal. Thus, it was submitted that the Court of Appeal was wrong to conclude that:

> There is no doubt that the PP appointed Dato' Seri Shafee under s 376(3) as clearly stated in the appointment letter of 02.07.2013. The appointment is specifically make for the purpose of the pending appeal in Rayuan Jenayah No. W-05–19–01–2012.

Thus, according to Encik Karpal Singh, without of the affidavit Tan Sri Shafee there is no evidence, documentary or otherwise of the appointment of Tan Sri Shafee as a deputy public prosecutor.

[12] Likewise, according to Encik Karpal Singh, the Court of Appeal was also in error in making reference in the ground of judgment to the statement of Tan Sri Shafee under s 112 of the CPC which was exhibited as 'NB3' in the affidavit of Puan Noorin bt Badaruddin. The Court of Appeal had held:

> Having perused his statement under s 112, we find that they were recorded in relation to his presence at the house at the time when Mohd Saiful Bukhari met the Prime Minister, Dato' Seri Najib. We do not see how he would be relevant to a sodomy charge against the applicant. The facts of which in our view is too fleeting to bear any relevance to a sodomy charge. Our view is further fortified by the fact that both the prosecution as well the defence did not find him to be a relevant witness at the trial.

[13] According to Encik Karpal Singh, the above finding by the Court of Appeal was wrong as the affidavit of Puan Noorin bt Badaruddin had been struck out by the Court of Appeal. In short Encik Karpal Singh's complaint is that the Court of Appeal had misdirected itself by taking into account the contents of the affidavit which it itself had been struck out.

[14] With respect, we are of the view that the question whether Tan Sri Shafee had been duly appointed as a deputy public prosecutor was not the issue before the court. In issue before us was the validity of his appointment as a deputy public prosecutor. This can clearly be seen from the notice of motion filed by DSAI as well as in the affidavit in support of the application. In the notice of motion DSAI was seeking for the following prayers:

> (i) Dato' Sri Muhammad Shafee bin Md Abdullah dibatalkan sebagai kaunsel bagi pihak pendakwaan di dalam Mahkamah Rayuan (Bidangkuasa Jenayah) Rayuan Jenayah No W-05–19–01–2012 ('rayuan tersebut');
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> (ii) Pelantikan Dato' Sri Muhammad Shafee bin Md Abdullah di bawah seksyen 376(3) dan 379 Kanun Acara Jenayah dan Artikel 145(3) Perlembagaan Persekutuan untuk bertindak sebagai kaunsel bagi pihak pendakwaan di dalam rayuan tersebut adalah batal, tidak sah dan tidak berkesan memandangkan Dato' Sri Muhammad Shafee bin Md Abdullah

A sepatutnya dilantik di bawah seksyen 379 Kanun Acara Jenayah sahaja sebagai seorang peguambela dan memandangkan pemakaian doktrin 'desuetude' kepada seksyen 379 Kanun Acara Jenayah; dan

(iii) Apa jua perintah lain yang difikirkan patut dan adil oleh Mahkamah Yang Mulia ini.

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[15] Further in the affidavit in support, DSAI clearly states at paras 5–7 the following:

C (5) Saya selanjutnya menyatakan bahawa semasa rayuan tersebut dipanggil untuk perbicaraan pada 22 haribulan Julai 2013, pihak pendakwaan telah pun melantik Dato' Sri Muhammad Shafee bin Md Abdullah sebagai kaunsel bagi pihak pendakwaan di dalam rayuan tersebut dan Dato' Sri Muhammad Shafee bin Md Abdullah tersebut telah pun memaklumkan bahawa pelantikannya tersebut adalah selaras dengan seksyen 376(3) dan
D 379 Kanun Keseksaan dan Artikel 145(3) Perlembagan Persekutuan dan bahawa beliau juga telah pun di bayar gaji akibat pelantikannya tersebut.

(6) Saya adalah dinasihatkan oleh peguamcara saya, nasihat yang mana saya percayai adalah tepat dan benar, bahawa memandangkan pemakaian doktrin 'desuetude' kepada seksyen 379 Kanun Acara Jenayah, pelantikan
E Dato' Sri Muhammad Shafee bin Md Abdullah tersebut adalah batal, tidak sah dan tidak berkesan.

(7) Saya seterusnya adalah dinasihatkan oleh peguamcara saya, nasihat yang mana saya percayai adalah tepat dan benar, bahawa pelantikan Dato' Sri Muhammad Shafee bin Md Abdullah tersebut di bawah seksyen 376(3)
F Kanun Acara Jenayah adalah juga batal, tidak sah dan tidak berkesan memandangkan ianya adalah bertentangan dengan seksyen 379 Kanun Acara Jenayah yang mana Dato' Sri Muhammad Shafee bin Md Abdullah tersebut sepatutnya dilantik oleh kerana pembayaran gaji Dato' Sri Muhammad Shafee bin Md Abdullah tersebut oleh pihak kerajaan sebagai
G seorang peguambela adalah jelasnya bertujuan memampas Dato' Sri Muhammad Shafee bin Md Abdullah tersebut sebagai seorang peguambela dan juga bahawa perkara ini merupakan satu rayuan jenayah yang dirangkumi secara ekspres oleh seksyen 379 Kanun Acara Jenayah tersebut.

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[16] From the above, it is clear that DSAI was only challenging the validity of the appointment of Tan Sri Shafee as a deputy public prosecutor, not the existence of that appointment. Since the complaint is not on the appointment per se but on its validity, there is in our view no need for Tan Sri Shafee to
I adduce any evidence on that appointment. We thus rule that there is no necessity for Tan Sri Shafee to depose on affidavit the fact of his appointment as a deputy public prosecutor.

[17] Likewise, the reference by the Court of Appeal to statement under s 112

of the CPC, which had been struck out, has no effect on our decision on the issue of conflict of interest on the part of Tan Sri Shafee. As we have stated earlier on the facts and circumstances of this case, no case had been made out on the issue of conflict of interest.

[18] For the above reasons, we dismiss the appeal and affirm the decision of the Court of Appeal.

Appeal dismissed.

Reported by Maria Ahamad